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Nos. 915, 917, 921

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,
Appellant,

MANUFACTURERS HANOVER TRUST COMPANY, AS TRUSTEE UNDER THE FIRST AND REFUNDING MORTGAGE OF THE DEBTOR,
Appellant,

THE CHASE MANHATTAN BANK, N.A. AS TRUSTEE UNDER THE GENERAL INCOME MORTGAGE OF THE DEBTOR,
Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

RESPONSE OF APPELLEE, RICHARD JOYCE SMITH, TRUSTEE OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, TO JURISDICTIONAL STATEMENTS

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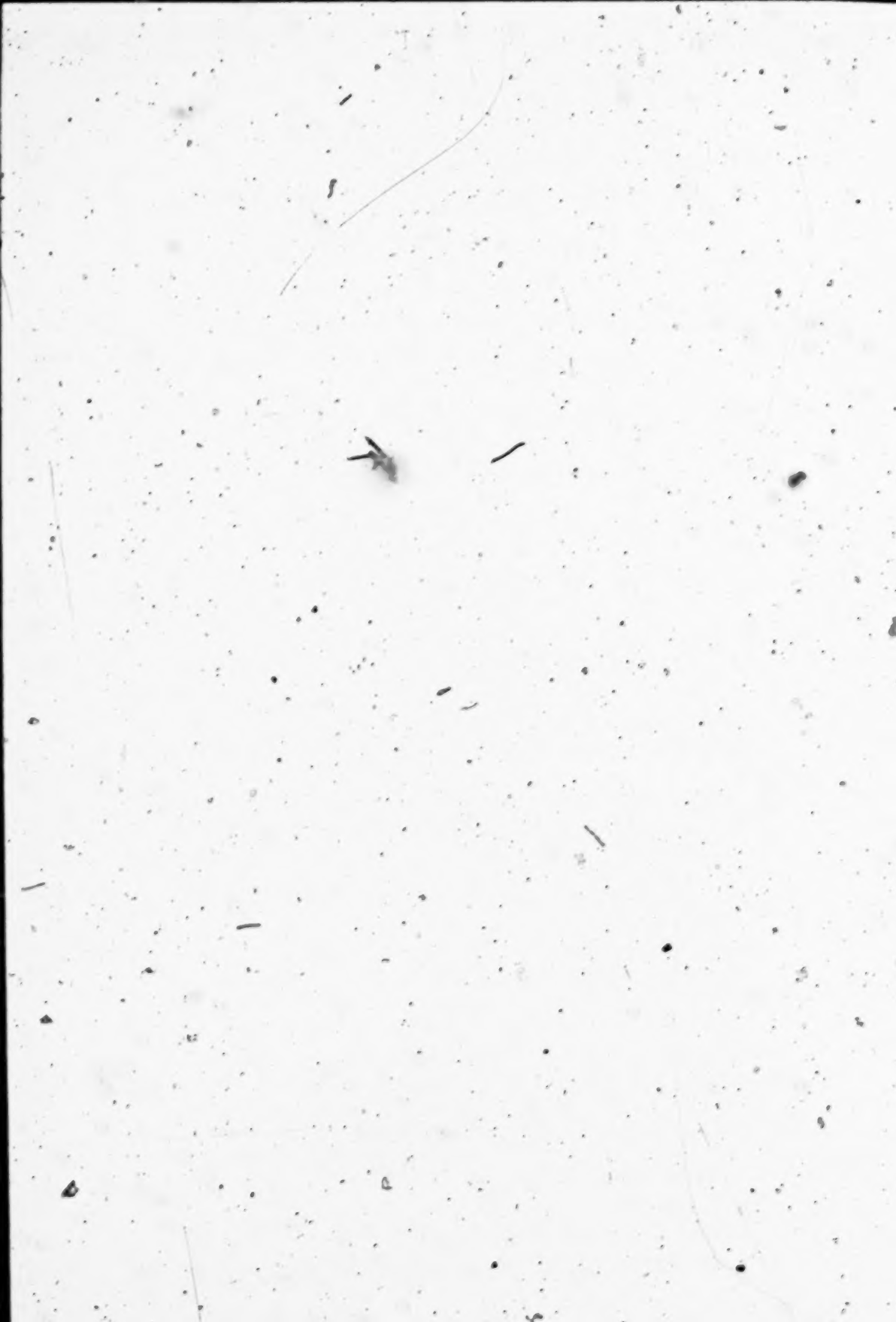
Of Counsel
December 12, 1969



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Richard Joyce Smith, Trustee of the property of The New York, New Haven and Hartford Railroad Company, Debtor (the "New Haven"), was an intervening plaintiff in the proceedings before the three-judge court in the Southern District of New York which issued the order being appealed from in Nos. 915, 917 and 921.[1] Although Trustee

[1] Trustee Smith's motion to intervene was granted on January 29, 1969.

Smith is nominally an appellee before this Court, he supports appellants' contentions in their jurisdictional statements as to jurisdiction and the substantial nature of the questions presented. Appellants have also filed petitions for certiorari before judgment to the Court of Appeals for the Second Circuit in Nos. 914, 916 and 920, involving essentially the same questions presented here. Trustee Smith, as respondent in those cases, has filed a response in support of the petitions.

Providence and Worcester Railroad Company has filed a jurisdictional statement in No. 919, and has also filed a petition for certiorari before judgment in No. 918. Pursuant to Rule 16 of the Rules of the Court, Trustee Smith hereby waives the right to file a motion to dismiss or affirm in No. 919, and has similarly waived the right to respond in No. 918.

On December 31, 1968, the New Haven's railroad operations and substantially all of its assets (other than cash and temporary cash investments) were transferred to Penn Central Company ("Penn Central"). The transfer was effected pursuant to order of the Interstate Commerce Commission (the "Commission") dated November 25, 1968 (the "Fourth Supplemental Order"), and, since the New Haven is in reorganization under Section 77 of the Bankruptcy Act, pursuant to order dated December 24, 1968, of the United States District Court for the District of Connecticut (the "Reorganization Court").

The Fourth Supplemental Order fixed the terms of the New Haven's inclusion in Penn Central,[2] based upon findings made by the Commission for the purposes of both Section 5(2)(d) of the Interstate Commerce Act and Sec-

[2] Joint Appendix of Appellants (hereinafter cited "App") p. 158a. Penn Central was created by the merger of The New York Central Railroad Company into The Pennsylvania Railroad Company approved by orders of the Commission reviewed by the Court in 386 U. S. 372 (1967) and 389 U. S. 486 (1968). Under these orders, the New Haven's inclusion was required as a condition of such merger.

tion 77(d) of the Bankruptcy Act, and directed that the transfer be effected by January 1, 1969, even though judicial review of the terms might be pending.

In the Fourth Supplemental Order the Commission modified terms for inclusion previously fixed in its Second Supplemental Order, dated November 16, 1967, that had been reversed by a three-judge court in the Southern District of New York,[3] and disapproved by the Reorganization Court,[4] as providing inadequate consideration for the New Haven's assets.

Appellants (and another) brought a proceeding in a three-judge court in the Southern District of New York to review so much of the Fourth Supplemental Order as was entered under the Interstate Commerce Act.[5] Upon certification by the Commission of its Fourth Supplemental Report as a plan of reorganization for the New Haven, a parallel proceeding was instituted in the Reorganization Court in which the terms of the consideration were reviewed under the Bankruptcy Act. The Reorganization Court approved the transfer to Penn Central and the receipt of consideration in the amount fixed by the Commission as a "first step" in the plan of reorganization, subject to a general reservation of jurisdiction to review the plan, including objections already filed as to the amount of consideration.

On May 28, 1969, the Reorganization Court filed a memorandum on the issue of price, in which it found that it could not approve the plan of reorganization as being fair and equitable unless the consideration for the assets transferred to Penn Central was increased by approximately $29

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[3] 289 F. Supp. 418 (1968).

[4] 289 F. Supp. 451 (1968).

[5] In the earlier proceeding in the three-judge court to review the Commission's Second Supplemental Report and Order, the United States took the position that the matters involved were wholly within the jurisdiction of the Reorganization Court. This contention, which was overruled at that time, was not subsequently renewed in connection with the Fourth Supplemental Order.

million.[6] On July 28, 1969, it entered an order returning the plan of reorganization to the Commission for the reasons stated in its May 28 memorandum.[7] Appeals have been taken to the Court of Appeals for the Second Circuit by the appellants herein and others, and the appellants herein, as above noted, have concurrently with their jurisdictional statements filed petitions with this Court for the issuance of writs of certiorari before judgment.

The three-judge court entered an opinion on June 18, 1969 in which it found that the Commission's Fourth Supplemental Report undervalued the worth of the New Haven's assets in certain respects and that, as a consequence of various specified adjustments, Penn Central should be required to pay additional consideration, subject to computations required to be made by the Commission.[8] As directed by the three-judge court, the Commission submitted a form of decree, accompanied by its Fifth Supplemental Report, dated July 10, 1969 (modified August 26, 1969), and the three-judge court entered an order on September 11, 1969 in which, among other things, it required the consideration to be paid by Penn Central to be increased by approximately $1 million, or some $28 million less than the Reorganization Court considers to be fair and equitable under the Bankruptcy Act.

The disparity solely between the two courts of some $28 million indicates the magnitude of the issues in terms of the financial interest of the New Haven estate. Furthermore, the appellants seek additional consideration which is three-fold that amount.

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[6] App. 277a.

[7] App. 316a.

[8] App. 400a. There was a dissenting opinion which considered that substantial increases in the consideration and a remand to the Commission would be required.

The quantum of fair consideration is not the only substantial question raised. There is involved in these appeals a significant public interest in resolving a conflict between two district courts of the same circuit in determining substantially the same issue under two different statutes, and in resolving the questions that have now arisen as to the relationship between those statutes.

The Trustees' petition under Section 5(2)(d) of the Interstate Commerce Act, that the Commission fix inclusion of the New Haven's operations as a condition to its approval of the Penn Central merger, was the first time that a major carrier sought to take advantage of that provision.[9] In the *Penn-Central Merger and N&W Inclusion Cases,* the Court considered inclusion terms fixed by the Commission,[10] but no questions were raised of the impact upon the valuation determinations under the parallel standards of the Bankruptcy Act and Section 5(2)(d) of the Interstate Commerce Act.

In light of the increased number of Section 5 proceedings, including several now pending before the Commission and the courts, and due to the common financial hardships being experienced by the nation's railroads and the likelihood that pending and future railroad reorganizations may be carried out through inclusion in trunk line systems, the instant appeals pose substantial questions, and it is in the public interest that they be resolved definitively.

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[9] Cf. *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.,* 347 U. S. 298 (1954), in which the Court held that the Commission could not use Section 77(f) of the Bankruptcy Act to initiate and compel a railroad merger under Section 5 of the Interstate Commerce Act, in view of the policy under Section 5 which prevents Commission-initiated mergers.

[10] 389 U. S. 486 (1968). The Court reviewed the terms for inclusion of the Erie-Lackawanna, Delaware & Hudson and Boston & Maine Railroads in the Norfolk & Western System.

A conclusive determination of the conflict between the two courts and of the relationship between the two statutes involved can be achieved only if the Court grants plenary consideration to these appeals and provides for briefing and argument on a consolidated basis with the appeals from the Reorganization Court now before the Court of Appeals for the Second Circuit. In his response filed this date to the petitions for certiorari before judgment, Trustee Smith has supported the petitioners in urging the Court to grant the petitions.

In the event, however, that the Court determines not to grant the petitions at this time but to await decision by the Court of Appeals for the Second Circuit, the Court is respectfully requested to consider postponing briefing and argument on the instant appeals until the cases now before the Court of Appeals can be brought up to this Court and consolidated for disposition with these appeals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the questions presented by the appellants are so substantial as to require plenary consideration and that such consideration should be on a consolidated basis with the related matters in Nos. 914, 916 and 920.

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